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MAY 1 1896
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 4, Original.

EX PARTE: IN THE MATTER OF JONAS GROSSMAYER, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

I. E. TREHEARNE,
Attorney for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-24-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. ——, Original.

EX PARTE: IN THE MATTER OF JONAS GROSSMAYER, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

To the Supreme Court of the United States:

Your petitioner, Jonas Grossmayer, respectfully alleges that he is a citizen of the United States and of the State of Texas and a resident in and an inhabitant of the city of Galveston, in the county of Galveston, in said State, and that he resides within the territorial jurisdiction of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit, and that on February 7, 1899, he instituted in the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit, a suit against Robert G. Dun, a citizen of the State of New York, and Robert D. Douglas, a citizen of the State of New Jersey, and in his petition filed in said suit he alleges in substance that under the name of R. G. Dun & Company the said R. G. Dun and R. D. Douglas carried on

and conducted in the State of Texas, and in every State in the United States, during the year A. D. 1898 and long prior thereto, and when said petition was filed carried on and conducted in the State of Texas, a business that is unique and peculiar, and that the said R. G. Dun & Company have published to the world, by the records of the circuit court of the United States for the eastern district of Texas, that under the peculiar laws of Texas and the decisions of the courts they dare not challenge the jurisdiction of the courts of the State of Texas or the service of process of citation upon their agents resident in the State of Texas and conducting their business in said State without submitting themselves to the jurisdiction of the courts of the State of Texas; and your petitioner alleges in his petition aforesaid that said R. G. Dun & Company have published to the world, by the medium aforesaid, that they will not, when sued in the courts of the State of Texas upon a charge of having published, in the conduct of their business in said State, a false and defamatory statement of and concerning a citizen of said State, submit themselves to the jurisdiction of the courts of said State; and your petitioner alleges in his petition aforesaid that said R. G. Dun & Company have published to the world, by the medium aforesaid, that on January 1, 1889, and for many years prior thereto R. G. Dun was the sole owner and proprietor of the commercial-agency business which had been for many years conducted by him under the name of R. G. Dun & Company in various cities in the United States and elsewhere, and that on or about January 1, 1889, an association was formed in said business under the name and style of R. G. Dun & Company; and that said association was composed of R. G. Dun and Erastus Wiman and Robert D. Douglas and Arthur J. King, and that said Erastus Wiman and Robert D. Douglas and Arthur J. King were required to devote their time, attention, and labor to the business of said association; and that the said R. G. Dun & Company

have published to the world that for more than twenty years prior to the year 1895 it has been the business and was, when said publication was made, the business of R. G. Dun & Company to obtain and furnish commercial information of the financial condition and standing of merchants throughout the United States and elsewhere for a consideration paid them and to be paid to them by their subscribers; that they have more than 20,000 subscribers in the United States, a large proportion of whom in Texas, to the number of at least 3,000, are interested in the standing and financial condition, assets, and liabilities of merchants in Texas, and have paid and have agreed to pay large sums of money for such information, and that said R. G. Dun & Company have made contracts and have undertaken with those various subscribers for a money consideration, the sum being from $50 to $100 per year, to keep them duly informed of and concerning the financial standing, assets, and liabilities of merchants, and to answer all inquiries addressed to them by said subscribers in relation thereto, and that said R. G. Dun & Company have published to the world that said Erastus Wiman has withdrawn from said association, and that said Arthur J. King is dead.

Your petitioner represents that in his aforesaid petition he further alleges that the business in which said R. G. Dun & Company is engaged and were engaged at the time thereinafter mentioned is by means of local agents in all the cities and towns throughout the United States, including the city of Galveston, in the State of Texas, and other cities and towns in the State of Texas, to ascertain the financial standing and credit of all merchants and traders within the territory wherein such agents are stationed, and to report to all merchants and traders in the United States who subscribe and agree to pay therefor such information so obtained of the financial standing and credit of all merchants and traders in the United States, and that in pursuit of its business said R. G. Dun & Company have procured as

subscribers, who agree to pay for such information as above mentioned, a large number of merchants and traders in all the cities and towns in the United States, and to those subscribers the said R. G. Dun & Company make their reports, as aforesaid, and that said reports are printed and published in book form and in other forms, and are sent out and circulated semi annually and oftener by said R. G. Dun & Company among their subscribers in all the cities and towns in the United States.

Your petitioner alleges in his said petition that in so far as R. G. Dun & Company are seeking to get money by furnishing to those who pay them information not known to be true of and concerning the assets and credit of merchants, and in so far as said information is not true such means of getting money is capable of doing great harm, and is immoral and is not recognized by law; and your petitioner alleges and charges in his said petition that said R. G. Dun and Robert D. Douglas do not constitute such a partnership as is recognized by law, and that they are an association engaged in carrying on in the State of Texas and elsewhere the aforesaid business, which, as alleged by them, as aforesaid, they are carrying on.

Your petitioner alleges in said petition that he was when said petition was filed, and has been continually for twenty-seven years, a merchant in the city of Galveston, in the eastern district of Texas, and that he deals in a great variety of articles of merchandise, such as clothing, gentlemen's furnishing goods, boots and shoes, hats and caps, and trunks and valises, and that he buys his stock of merchandise in part in the following-named cities: In New York, in the State of New York, and in Baltimore, in the State of Maryland, and in Boston, in the State of Massachusetts, and in Philadelphia, in the State of Pennsylvania, and in Chicago, in the State of Illinois, and in Cincinnati, in the State of Ohio, and in St. Louis, in the State of Missouri, and in New Orleans, in the State of Louisiana, and that his stock of

merchandise in his possession and owned by him before and at the time of the publication made by said R. G. Dun & Company and thereinafter set forth in said petition was and is, when said petition was filed, of the value of forty thousand dollars.

Your petitioner alleges in said petition that his credit was, until the publication of the false and malicious statement made by said R. G. Dun & Company, and in said petition thereafter set forth, of the highest degree and unquestioned in the mercantile community in the city of Galveston and wherever elsewhere he had occasion to deal and did deal as a merchant.

Your petitioner alleges in said petition that in the month of July, A. D. 1898, the said R. G. Dun & Company caused to be made and printed and published a large number of books, wherein is set forth the names of merchants in the cities and towns throughout the United States, together with what purports to be, and is intended by said R. G. Dun & Company to be, a statement and report of the financial standing and credit of the merchants therein named; that among the names of the merchants therein set forth is the name of your petitioner, together with a statement purporting to be his financial standing and credit, as stated by said R. G. Dun & Company; that there is set forth in said books a list of certain letters of the alphabet, beginning with the letter A and ending with the letter M, and opposite each letter are set certain figures and words as explanatory of the meaning and significance of each of said letters of the alphabet, and intended to indicate the several gradations of pecuniary strength, ranging from $1,000,000 and more than that amount down to less than $500.

That above said list is printed the words "Explanatory key to ratings;" that above said list is printed, as explanatory of the meaning and significance of said letters and figures and words, the words "Estimated pecuniary strength."

That above said list there is also printed, as explanatory

of the meaning and significance of said letters and figures, the words "General credit," all which is set forth in said books as an explanation or key by which to read and understand the reports as made therein of the pecuniary strength and credit of the merchants therein named, all which is in words and figures as follows, to wit:

Explanatory Key to Ratings.

Left-hand columns.		Right hand columns.			
Estimated pecuniary strength.		General credit.			
		High.	*Good.*	*Fair.*	*Limited.*
A A	Over $1,000,000	A 1	1	1½	2
A x	$750,000 to $1,000,000	A 1	1	1½	2
A	$500,000 to $750,000	A 1	1	1½	2
B x	$300,000 to $500,000	1	1½	2	2½
B	$200,000 to $300,000	1	1½	2	2½
C x	$125,000 to $200,000	1	1½	2	2½
C	$75,000 to $125,000	1½	2	2½	3
D x	$50,000 to $75,000	1½	2	2½	3
D	$35,000 to $50,000	1½	2	2½	3
E	$20,000 to $35,000	2	2½	3	3½
F	$10,000 to $20,000	2½	3	3½	4
G	$5,000 to $10,000	.....	3	3½	4
H	$3,000 to $5,000	.....	3	3½	4
J	$2,000 to $3,000	.....	3	3½	4
K	$1,000 to $2,000	.....	.....	3½	4
L	Less than $1,000	1½	2	3	4
M	Less than $500	1½	2	3	4

Your petitioner alleges in said petition that in said books there is printed of and concerning him in his business the following false and defamatory statement, to wit:

Grossmayer, Jonas, D. G. Clo., etc., F, 4.

Your petitioner alleges in said petition that the aforesaid false and defamatory statement as contained in said printed books was made and published of him in his business as a merchant, and was published and circulated by said R. G. Dun & Company among their subscribers and others in all the cities and towns of the United States.

Your petitioner alleges in said petition that by said false and defamatory statement the said R. G. Dun & Company intended and meant it to be understood that the estimated strength of Jonas Grossmayer as a merchant, meaning thereby your petitioner, was at the time between ten thousand and twenty thousand dollars.

Your petitioner alleges in said petition that by said false and defamatory statement the said R. G. Dun & Company intended and meant it to be understood that the credit of Jonas Grossmayer as a merchant, meaning thereby your petitioner, was limited, meaning thereby that the credit of your petitioner was not A 1, nor high, nor good, nor fair, but that it was comparatively the lowest degree of credit.

Your petitioner alleges in said petition that the aforesaid false and defamatory statement of and concerning him as a merchant was *not made in the discharge of any duty*, and was recklessly and maliciously made by said R. G. Dun & Company, and, without any justification or excuse, was falsely and maliciously published and circulated by said R. G. Dun & Company throughout the United States.

Your petitioner alleges in said petition that by reason of the officious and unwarranted publication and circulation of the said false and defamatory report among the aforesaid subscribers and patrons of said R. G. Dun & Company and others in all the cities and towns in the United States, the reputation and financial standing and credit of your petitioner has been defamed and damaged in the sum of fifty thousand dollars, for which sum he prays judgment.

Your petitioner prays in said petition for process of citation to said R. G. Dun & Company, to be served upon John Fowler, who is alleged in said petition to reside in the city of Galveston, in the county of Galveston, and is alleged to be the local agent and representative of the said R. G. Dun & Company in the county of Galveston. He further prays in said petition for costs of suit and for general relief.

Your petitioner alleges that an exact copy of the said

petition, filed as aforesaid in the circuit court of the United States for the eastern district of Texas, is hereto annexed as a part of this petition and is marked "Exhibit A."

Your petitioner alleges that, in conformity with law, a citation to said R. G. Dun & Company was issued in said suit by C. Dart, the clerk of the aforesaid circuit court, on February 7, 1899, and in said citation the marshal of said district, John Grant, was commanded to summon R. G. Dun & Company to be and appear before said circuit court at the next term thereof, to be held in the city of Galveston on the 20th day of February, A. D. 1899, to answer the petition of Jonas Grossmayer, your petitioner herein.

Your petitioner alleges that on the 7th day of February, 1899, the marshal of said district, John Grant, made return upon said citation that he had received it on February 7, 1899, and that he had executed it on the same day by delivering to John Fowler, the local agent of said R. G. Dun & Company and a resident of Galveston county, a true copy of said citation and a certified copy of plaintiff's petition that accompanied said citation.

Your petitioner alleges that the 21st day of February, 1899, was the day fixed by law as appearance day in said circuit court, when said R. G. Dun & Company were required by law and the practice in said court to appear and answer said petition.

Your petitioner alleges that said R. G. Dun & Company did not in any manner or form appear in said suit for any purpose on said 21st day of February, 1899, nor at any time, and did not on said day file an answer or any plea to plaintiff's petition, and have not at any time filed an answer to said petition in said cause, and have not at any time filed in said cause any demurrer or plea to the jurisdiction of said circuit court.

Your petitioner alleges that upon the call of the default docket in said court by the judge thereof on the 23d day of February, 1899, the aforesaid suit of your petitioner

against R. G. Dun & Company was called by the judge of said court in the regular course of procedure in said court, and thereupon your petitioner, by his attorney, moved the court to grant him a judgment by default against said R. G. Dun & Company; and thereupon John C. Walker, Esq., an attorney-at-law, submitted to the court certain paper-writings, copies of which are as follows and are herein marked No. 1, No. 2, No. 3.

No. 1.

CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF TEXAS.

JONAS GROSSMAYER *vs.* R. G. DUN & CO. } No. 1899.

Now comes John C. Walker, an attorney of this court and as *amicus curiæ*, and suggests to this court that the petition in this cause filed shows a want of jurisdiction over R. G. Dun and R. D. Douglass, composing R. G. Dun & Company, for that it alleges that Robert G. Dun is a citizen of New York and Robert D. Douglass is a citizen of the State of New Jersey, and it does not allege any facts conferring jurisdiction upon the plaintiff in this suit in any manner, and alleges no facts whatever which would permit this court to entertain this suit; and he further shows that the attempted service of process upon said defendants is absolutely void, and that an inspection of the same shows it to be without validity of any kind. Wherefore the said John C. Walker calls to the attention of this court that this suit is without jurisdiction of the defendants and without any service upon them or either of them, and suggests that no judgment be rendered in this cause.

(Signed) JOHN C. WALKER.

(Indorsements:) "C. L., No. 1899. Jonas Grossmayer *vs.* R. G. Dun & Company. Plea to jurisdiction by John C. Walker, *amicus curiæ*. Filed February 22d, 1899. C. Dart, clerk."

No. 2.

CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF TEXAS.

JONAS GROSSMAYER *vs.* R. G. DUNN & COMPANY. } No. 1899.

Now comes John C. Walker, attorney for Robert G. Dun and Robert D. Douglass, only to deny jurisdiction over them, and denies specifically that this court has any jurisdiction over the said Robert G. Dun and Robert D. Douglass, and he says on oath that he knows of his personal knowledge that both said Robert G. Dun and Robert D. Douglass were at the time of the institution of this suit citizens of the State of New York and New Jersey respectively, and that neither one was either a citizen or resident of the State of Texas; and he says that neither Robert G. Dun nor Robert D. Douglass are now either citizens or residents of the State of Texas, but they are, as aforesaid, citizens of the State of New York and of New Jersey, and they have their domicile and residence and so had such domicile and residence at the date of the filing of this suit, and that they do not appear in this suit for any purpose excepting to contest the jurisdiction of this court; and the said John C. Walker further says that Robert G. Dun and Robert D. Douglass should not be sued in this court, for that they are not a corporation and have never been a corporation, but are private individuals, and said John C. Walker does not make any appearance for said Robert G. Dun and Robert D. Douglass, and does not waive any right of the said Robert G. Dun and Robert D. Douglass,

but only files this objection to the jurisdiction of this court because the attempt to subject citizens of different States to process from this court in this State is in fraud of the jurisdiction of this court and is contrary to the Constitution and laws of the United States and the decisions thereunder.

(Signed) JOHN C. WALKER.

Sworn to and subscribed before me. Given under my hand and seal of office this 22d day of February, A. D. 1899.

(Signed) C. DART, *Clerk.*

(Indorsements:) "C. L., No. 1899. Jonas Grossmayer *vs.* R. G. Dun & Company. Affidavit of John C. Walker, attorney for def'ts. Filed Feb'y 22, 1899. C. Dart, clerk."

No. 3.

UNITED STATES CIRCUIT COURT.

The President of the United States of America to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to summon R. G. Dun & Company, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the twentieth (20) day of February, 1899, to answer the petition of Jonas Grossmayer against R. G. Dun & Company, filed February 7, 1899, case No. 1899, C. L., in an action of damages, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not and due return of this writ make.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the eastern [SEAL.] district of Texas, at Galveston, this 7th day of February, in the year of our Lord eighteen hundred and ninety-nine, and of American Independence the 123d year.

(Signed) C. DART, *Clerk*,
(Signed) By GEO. H. BURNETT, *Deputy*.

[SEAL.]

A true copy.
Attest:
(Signed) C. DART, *Clerk*,
(Signed) By GEO. H. BURNETT, *Deputy*.

(Indorsements:) "Copy. C. L., 1889. Jonas Grossmayer *vs.* R. G. Dun & Company. Issued 7th day of February, A. D. 1899. (Signed) C. Dart, clerk, by (signed) Geo. H. Burnett, deputy."

CIRCUIT COURT OF THE UNITED STATES.

JONAS GROSSMAYER *vs.* R. G. DUN & COMPANY. } No. 1899.

Now comes John Fowler in his own behalf and says that he is a citizen of the State of Texas and a resident of the county of Galveston, in the eastern district of Texas. He shows that he has been served with process in this cause and attaches hereto the citation served upon him, which he says upon information and belief is void and without effect. He shows that he is and was at the institution of this suit a resident of the same district and the same State with the plaintiff, Jonas Grossmayer. He says of his own knowledge

that he is not a partner of the firm of R. G. Dun & Company, nor of Robert G. Dun and Robert D. Douglass, and he says of his own knowledge that said Robert G. Dun and Robert D. Douglass were at the time of the institution of this suit citizens of the States of New York and New Jersey and residents therein, and that neither of them was a citizen of the State of Texas or the eastern district of Texas, and that neither has ever been a resident of said State of Texas; and he shows that R. G. Dun and Robert D. Douglass are partners, doing business in the State of New York, and were such partners at the time of the institution of this suit; and the said John Fowler denies any jurisdiction over himself or over the said Robert G. Dun or Robert D. Douglass or the firm of R. G. Dun & Company by reason of the citation served upon him, a copy of which is hereto attached.

(Signed) JOHN FOWLER.

Sworn to and subscribed before me. Witness my hand and seal of office this 22d day of February, 1899.

[SEAL.] (Signed) C. DART, *Clerk.*

(Indorsements:) "C. L., 1899. Jonas Grossmayer *vs.* R. G. Dun & Company. Affidavit of Jno. Fowler. Filed February 22, 1899. C. Dart, clerk."

Your petitioner alleges that upon consideration of the suggestions contained in the aforesaid paper-writings No. 1 and No. 2 and No. 3 the court (the Honorable David E. Bryant being the judge presiding) refused to render a judgment by default in said cause in favor of your petitioner and against said R. G. Dun & Company, and thereupon an order was made by said court, a copy of which is in words and figures as follows, to wit:

JONAS GROSSMAYER
vs.
R. G. DUN AND COMPANY. } C. L., 1899.

On this day came the plaintiff, by his attorney, and moved the court that judgment by default be entered against the defendant herein for the want of an appearance or answer, as required by law; and, the said motion having been heard and argued before the court, and the court being sufficiently advised, it is considered and ordered by the court that the said motion be denied.

Your petitioner alleges that the docket number of said suit in said circuit court is 1899, and that the Honorable David E. Bryant, the judge presiding, as aforesaid, in said cause, is the judge of the district court of the United States for the eastern district of Texas, and was the only judge presiding in said cause at the February term, 1899, of said circuit court.

Your petitioner alleges that a copy of the aforesaid citation to R. G. Dun & Company, issued, as aforesaid, by the clerk of said court and served as aforesaid, and a copy of the return thereon by said marshal is hereto annexed as a part of this petition and is marked Exhibit B.

The premises considered, your petitioner prays for the writ of mandamus, directed to the Honorable David E. Bryant in his official capacity, as aforesaid, and requiring him to render and to cause to be entered a judgment by default in said cause No. 1899 in said circuit court in favor of your petitioner and against said R. G. Dun & Company, or to show cause within such time as may be appointed by this court why he should not render and cause to be entered such judgment by default.

Your petitioner prays that upon a hearing the writ of mandamus be made peremptory, and he prays for such other and further relief to which he may be entitled.

Your petitioner begs to state that his counsel, L. E. Treze-

vant, Esq., is not licensed as an attorney-at-law in your honorable court, and he prays that he, your petitioner, be allowed to present and to prosecute this his petition in his own proper person.

Your petitioner begs to submit herewith to the court, as a matter of convenient reference, the statute of the State of Texas under and by authority of which the citation in the aforesaid suit No. 1899 was issued and served as aforesaid; which statute in the Revised Statutes of 1895 is as follows:

"Art. 1223. In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association, or acting corporation or association."

JONAS GROSSMAYER.

THE STATE OF TEXAS, }
County of Galveston. }

Before me, the undersigned authority, the clerk of the circuit court of the United States for the eastern district of Texas, this day came Jonas Grossmayer, to me known to be the petitioner in the foregoing petition, and, being by me duly sworn, made the following statement:

I, Jonas Grossmayer, do solemnly swear that the allegations of facts made in the foregoing petition as of my own knowledge are true, and those made upon information I believe to be true.

JONAS GROSSMAYER.

Sworn to and subscribed before me by Jonas Grossmayer this the 31st day of March, A. D. 1899.

[SEAL.] C. DART,
Clerk United States Circuit Court,
Eastern District of Texas,
By GEO. H. BURNETT, *Deputy.*

"EXHIBIT A."

To the honorable the circuit court of the United States for the eastern district of Texas, at Galveston:

Your petitioner, Jonas Grossmayer, a citizen of Galveston county, in the eastern district of Texas, complains of Robert G. Dun, a citizen of the State of New York, and of Robert D. Douglas, a citizen of the State of New Jersey, and alleges as follows:

That under the name of R. G. Dun & Company the said R. G. Dun and R. D. Douglas carried on and conducted in this State, and in every State in the United States, during the year A. D. 1898 and long prior thereto, and now carry on and conduct in this State, and in every State in the United States, a business that is unique and peculiar.

Plaintiff alleges that the gravamen of this complaint hereinafter set forth is of such a character as to warrant him in alleging that the business so carried on by the said R. G. Dun & Company is peculiar and unique in this, that it is unlike any business carried on in this State by any person or association of persons, or by any corporation created by the laws of this State, or by any corporation doing business in this State, except the Bradstreet Company, which is a corporation created by the laws of Connecticut, and is carrying on in this State the same peculiar kind of business as that carried on in this State by said R. G. Dun & Company. Plaintiff alleges that while the business so carried on by said R. G. Dun & Company is the same kind of business carried on by said Bradstreet Company, the said R. G. Dun & Company differs from the Bradstreet Company only in one particular, to wit, the Bradstreet Company is a corporation and publishes to the people of this State that in the transaction of its business said corporation invokes the comity of this State and consents to be amenable to its laws and to be sued in its courts if in the conduct of its business it should harm a citi-

zen of Texas, while the said R. G. Dun & Company, engaged in the same peculiar sort of business in this State, do not publish to the people of this State that in coming into this State for the transaction of their business they consent to be amenable to the laws of this State and to be sued in its courts if in the conduct of their business they should harm a citizen of Texas, but the said R. G. Dun & Company publish to the world that they are not a corporation, and that consequently if in the conduct of their business in the State of Texas, by and through their agents and servants resident in the State of Texas, they should publish a false and defamatory statement of and concerning a citizen of Texas they are not amenable therefor and are not to be held liable therefor in the courts of this State, and the said R. G. Dun & Company have published to the world by the records of the circuit court of the United States for the eastern district of Texas and by other mediums of publication that the allegation in a certain suit instituted against them in this State that they are a joint stock company was not true and was made for the purpose and with the intent and with the endeavor to fraudulently give the courts of the State of Texas jurisdiction over said R. G. Dun & Company under and by authority of the laws of Texas, and that said allegation was made under color of the laws of Texas to subject said R. G. Dun & Company to the deprivation of the right and privilege of not being sued in the courts of Texas when said R. G. Dun & Company are charged with having made a false and defamatory publication of and concerning the business of a citizen of Texas in a suit instituted against them in the courts of this State, and the said R. G. Dun & Company have written it down in the record of said suit and have thereby published to the world that at their instance the service of citation in said suit upon a local agent of theirs in this State, whose name is Leroy Gregory, was adjudged by the circuit court of the United States aforesaid not to be a legal service of process upon said R. G. Dun & Company,

upon the ground that said citation was served upon said Leroy Gregory as the local agent of R. G. Dun & Company as a joint stock company, and that said R. G. Dun & Company were not a joint stock company, and the said R. G. Dun & Company have published to the world by the medium aforesaid that under the peculiar laws of Texas and the decisions of its courts they dare not challenge the jurisdiction of the courts of this State or the service of process of citation upon their agents resident in this State and conducting their business in this State without submitting themselves to the jurisdiction of the courts of this State, and they have published to the world that they will not, when sued in the courts of this State upon a charge of having published in the conduct of their business in this State a false and defamatory statement of and concerning a citizen of Texas, submit themselves to the jurisdiction of the courts of this State, and that any allegation in such suit upon such a charge against them that R. G. Dun & Company is a corporation or is a joint stock company defamed any citizen of Texas is a foul imputation, that R. G. Dun & Company are a corporation or a joint stock company, and is a fraud upon the jurisdiction of the courts of this State, and the said R. G. Dun & Company have published to the world that on January 1, 1889, and for many years prior thereto, R. G. Dun was the sole owner and proprietor of the commercial-agency business which had been for many years conducted by him under the name of R. G. Dun & Company in various cities in the United States and elsewhere, and that on about January 1, 1889, an association was formed in said business under the name and style of R. G. Dun & Company, and that said association was composed of R. G. Dun and Erastus Wiman and Robert D. Douglas and Arthur J. King, and that the said Erastus Wiman and Robert D. Douglas and A. J. King were required to devote their time, attention, and labor to the business of said association; and the said R. G. Dun & Company have published to the world that for

more than twenty years prior to the year 1895 it has been the business and is now the business of R. G. Dun & Company to obtain and furnish commercial information of the financial condition and standing of merchants throughout the United States and elsewhere for a consideration paid to them and to be paid to them by their subscribers; that they have more than 20,000 subscribers in the United States, a large proportion of whom in Texas, to the number of at least three thousand, are interested in the standing and financial condition, assets, and liabilities of merchants in Texas, and have paid and have agreed to pay large sums of money for such information, and that said R. G. Dun & Company have made contracts and have undertaken with those various subscribers for a money consideration, the sum being from $50 to $100 per year, to keep them fully informed of and concerning the financial standing, assets, and liabilities of merchants, and to answer all inquiries addressed to them by said subscribers in relation thereto, and the said R. G. Dun & Company announce in their printed circulars that in responding to inquiries made by their numerous subscribers as to the responsibility of persons with whom they have business transactions they experience frequent perplexity from an inability to give definite information as to their pecuniary resources and indebtedness, and that it is true that they do give their mere impressions upon those points.

Your petitioner alleges that said R. G. Dun & Company have published to the world that said Erastus Wiman has withdrawn from said association with R. G. Dun and Robert D. Douglas, and that said Arthur J. King is dead.

Your petitioner alleges that the business in which said R. G. Dun & Company is engaged and was engaged at the time hereinafter mentioned is, by means of local agents in all the cities and towns throughout the United States, including the city of Galveston, in the State of Texas, and other cities and towns in the State of Texas, to ascertain the

financial standing and credit of all merchants and traders within the territory wherein such agents are stationed, and to report to all merchants and traders in the United States who subscribe and agree to pay therefor such information so obtained of the financial standing and credit of all merchants and traders in the United States.

That in the pursuit of its business said R. G. Dun & Company has procured as subscribers who agree to pay for such information, as above mentioned, a large number of merchants and traders in all the cities and towns in the United States, and to those subscribers the said R. G. Dun & Company make their reports, as aforesaid; that said reports are printed and published in book form and in other forms and are sent out and circulated semi-annually and oftener by defendants among its subscribers in all the cities and towns in the United States.

Your petitioner alleges and charges that in so far as R. G. Dun & Company are seeking to get money by furnishing to those who pay them information not known to be true of and concerning the assets and credit of merchants, and in so far as such information is not true, such means of getting money is capable of doing great harm and is immoral and is not recognized by law; and your petitioner alleges and charges that said R. G. Dun and Robert D. Douglas do not constitute such a partnership as is recognized by law; and your petitioner alleges that they are an association engaged in carrying on in this State and elsewhere the aforesaid business which, as alleged by them, as aforesaid, they are carrying on.

Your petitioner alleges that though solicited by said R. G. Dun & Company, through their agents, to become a subscriber and to pay them for such information as they had to give, he declined to become a subscriber and has never become one.

Your petitioner alleges that he is now and has been continuously for twenty-seven years a merchant in the city of

Galveston, in the eastern district of Texas, and that he deals in a great variety of articles of merchandise, such as clothing, gentlemen's furnishing goods, boots and shoes, hats and caps, and trunks and valises, and that he buys his stock of merchandise in part in the following-named cities: In New York, in the State of New York, and in Baltimore, in the State of Maryland, and in Boston, in the State of Massachusetts, and in Philadelphia, in the State of Pennsylvania, and in Chicago, in the State of Illinois, and in Cincinnati, in the State of Ohio, and in St. Louis, in the State of Missouri, and in New Orleans, in the State of Louisiana.

Your petitioner alleges that his stock of merchandise in his possession and owned by him before and at the time of the publication made by said R. G. Dun & Company and hereinafter set forth was and is now of the value of forty thousand dollars.

Your petitioner alleges that his credit as a merchant was, until the publication of the false and malicious statement made by said R. G. Dun & Company and hereinafter set forth, of the highest degree and unquestioned in the mercantile community in the city of Galveston and whereever elsewhere he had occasion to deal and did deal as a merchant.

Your petitioner alleges that in the month of July, A. D. 1898, the said R. G. Dun & Company caused to be made and printed and published a large number of books, wherein are set forth the names of merchants in the cities and towns throughout the United States, together with what purports to be and is intended by said R. G. Dun & Company to be a statement and report of the financial standing and credit of the merchants therein named; that among the names of the merchants therein set forth is the name of your petitioner, together with a statement purporting to be his financial standing and credit as stated by said R. G. Dun & Company; that there is set forth in said books a list of certain letters of the alphabet, beginning with the letter A and end-

ing with the letter M, and opposite each letter are set certain figures and words as explanatory of the meaning and significance of each of said letters of the alphabet and intended to indicate the several gradations of pecuniary strength, ranging from $1,000,000 and more than that amount down to less than $500.

That above said list is printed the words "Explanatory key to ratings;" that above said list is printed, as explanatory of the meaning and significance of said letters and figures and words, the words "Estimated pecuniary strength."

That above said list there is also printed, as explanatory of the meaning and significance of said letters and figures, the words "General credit," all which is set forth in said books as an explanation or key by which to read and understand the reports as made therein of the pecuniary strength and credit of the merchants therein named, all which is in words and figures as follows, to wit:

Explanatory Key to Ratings.

Left-hand columns.		Right-hand columns.			
Estimated pecuniary strength.		General credit.			
		High.	*Good.*	*Fair.*	*Limited.*
A A	Over $1,000,000	A 1	1	1½	2
A x	$750,000 to $1,000,000	A 1	1	1½	2
A	$500,000 to $750,000	A 1	1	1½	2
B x	$300,000 to $500,000	1	1½	2	2½
B	$200,000 to $300,000	1	1½	2	2½
C x	$125,000 to $200,000	1	1½	2	2½
C	$75,000 to $125,000	1½	2	2½	3
D x	$50,000 to $75,000	1½	2	2½	3
D	$35,000 to $50,000	1½	2	2½	3
E	$20,000 to $35,000	2	2½	3	3½
F	$10,000 to $20,000	2½	3	3½	4
G	$5,000 to $10,000	.....	3	3½	4
H	$3,000 to $5,000	.....	3	3½	4
J	$2,000 to $3,000	.....	3	3½	4
K	$1,000 to $2,000	.....	.....	3½	4
L	Less than $1,000	.....	.....	3½	4
M	Less than $500	1½	3	3	4

Your petitioner alleges that in said books there is printed and published of and concerning him in his business the following false and defamatory statement, to wit:

Grossmayer, Jonas, D. G. Clo., etc., F, 4.

Your petitioner alleges that the aforesaid false and defamatory statement as contained in said printed books was made and published of him in his business as a merchant and was published and circulated by said R. G. Dun & Company among their subscribers and others in all the cities and towns of the United States.

Your petitioner alleges that by said false and defamatory statement the said R. G. Dun & Company intended and meant it to be understood that the estimated strength of Jonas Grossmayer as a merchant, meaning thereby your petitioner, was at that time between ten thousand and twenty thousand dollars.

Your petitioner alleges that by said false and defamatory statement the said R. G. Dun & Company intended and meant it to be understood that the credit of Jonas Grossmayer as a merchant, meaning thereby your petitioner, was limited, meaning thereby that the credit of your petitioner was not A 1, nor high, nor good, nor fair, but that it was comparatively the lowest degree of credit.

Your petitioner alleges that the aforesaid false and defamatory statement of and concerning him as a merchant was not made in the discharge of any duty and was recklessly and maliciously made by said R. G. Dun & Company, and, without any justification or excuse, was falsely and maliciously published and circulated by said R. G. Dun & Company throughout the United States.

Your petitioner alleges that by reason of the officious and unwarranted publication and circulation of the said false and defamatory report among the aforesaid subscribers and patrons of said R. G. Dun & Company and others in all the cities and towns in the United States the reputation and financial standing and credit of your petitioner has been

defamed and damaged in the sum of fifty thousand dollars, for which sum he prays judgment.

The plaintiff herein, Jonas Grossmayer, here gives notice to said R. G. Dun & Company to produce on the trial of this cause the aforesaid book made and purporting to have been published by them in the month of July, 1898, and containing in print the name of this plaintiff, as hereinabove set forth, and containing the words "Explanatory key to ratings."

Your petitioner prays for process of citation to said R. G. Dun & Company, to be served upon John Fowler, who resides in the city of Galveston, in the county of Galveston, and is the local agent and representative of the said R. G. Dun & Company in the county of Galveston. He further prays for costs of suit and for general relief.

L. E. TREZEVANT,
Attorney for Plaintiff.

(Indorsements:) "C. L., No. 1899. Jonas Grossmayer *vs.* R. G. Dun & Company. Original petition. Filed Feb'y 7th, 1899. C. Dart, clerk."

"EXHIBIT B."

UNITED STATES CIRCUIT COURT.

The President of the United States of America to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to summon R. G. Dun & Company, if to be found in your district, to be and appear before the honorable circuit court of the United States at the next term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the twentieth (20) day of February, 1899, to answer the petition of Jonas Grossmayer against R. G. Dun & Company,

filed February 7, 1899—case No. 1899, C. L.—in an action of damages, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not and due return of this writ make.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, [SEAL.] at Galveston, this 7th day of February, in the year of our Lord eighteen hundred and ninety-nine, and of American Independence the 123d year.

(Signed) C. DART, *Clerk*,
(Signed) By GEO. H. BURNETT, *Deputy*.

Received this writ on the 7th day of February, 1899, and I executed the same on the 7th day of February, 1899, by delivering to John Fowler, the local agent of R. G. Dun & Company and resident in Galveston county, in the eastern district of Texas, in person, a true copy of this writ and a copy of the petition, certified by the clerk of this court.

(Signed) JOHN GRANT,
U. S. Marshal, Eastern District of Texas,
(Signed) By J. W. WOOD, *Deputy*.

Fee, $2.

(Indorsement:) "C. L., No. 1899. Jonas Grossmayer *vs.* R. G. Dun & Company. Issued 7th day of Feb'y, A. D. 1899. (Signed) C. Dart, clerk, (signed) by Geo. H. Burnett, deputy."

Returned and filed 7th day of February, 1899.
(Signed) C. DART, *Clerk*.
(Signed) GEO. H. BURNETT, *Deputy*.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT GALVESTON.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of original petition, filed February 7, 1899, and citation issued February 7, 1899, and marshal's return thereon, in cause No. 1899 on the law docket of said court, entitled Jonas Grossmayer *vs.* R. G. Dun & Company, as the same now appears on file in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 1st day of April, A. D. 1899.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, Eastern District of Texas,
By GEO. H. BURNETT, *Deputy.*

[Endorsed:] No. 1899, C. L. United States circuit court, eastern district of Texas. Jonas Grossmayer *vs.* R. G. Dun & Co. Copy of original petition and citation, with marshal's return thereon.

Office Supreme Court U. S.
FILED
AUG 14 1899
JAMES H. McKENNEY,
Clerk.

16

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 4, Original.

EX PARTE: IN THE MATTER OF JONAS GROSSMAYER, PETITIONER.

ANSWER OF RESPONDENT.

WM. W. MACFARLAND,
Attorney for Respondent.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 8-12-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 4, Original.

EX PARTE: IN THE MATTER OF JONAS GROSSMAYER, PETITIONER.

ANSWER OF RESPONDENT.

To the Supreme Court of the United States:

David E. Bryant, as judge of the circuit court of the United States for the eastern district of Texas and on behalf of the said court, in compliance with the rule entered upon the above petition, returns as follows:

The petitioner, Jonas Grossmayer, brought an action in the said circuit court for the eastern district of Texas against R. G. Dun and Robert D. Douglass, carrying on business under the name of R. G. Dun & Co., and the complaint in that action is correctly set forth as Exhibit "A" to the above petition. A summons was issued upon the said complaint, requiring the marshal to summon "R. G. Dun & Co." if to be found within the district, to answer the complaint. A

correct copy of the said summons is set out as Exhibit "B" to the above petition.

The said summons was served upon the person and in the manner stated in the endorsement of the marshal on the summons, as set forth in the said Exhibit "B."

The action so brought was in due course of practice placed upon the docket of the said circuit court, and at a sitting of the court held on the 23d of February, 1899, the cause was duly called for suitable proceedings therein; whereupon John C. Walker, Esq., an attorney of the said circuit court, appeared specially for the said defendants in the action for the purpose of suggesting that the defendants had not been duly and lawfully served with process. The suggestion was in writing, it was duly filed, and it is set forth in the printed paper, with the endorsement thereon, at page 9 of the above petition, marked No. 1.

The suggestion so as above made and filed was accompanied by an affidavit of the said John C. Walker, of the same date and filed at the same time. The said affidavit and the endorsement thereon is set out in the above petition, and is the paper marked 2, on page 10 thereof. By this affidavit it was made to appear that the defendants, Robert G. Dun and Robert D. Douglass, were copartners, and that neither of them were residents of the eastern district of Texas. At the same time an affidavit of John Fowler, the person upon whom the summons was served by the marshal, as aforesaid, was filed in the action, by which it appeared that he, the said Fowler, was not an agent of the defendants or of either of them for the purpose of accepting service of the said summons or other process. The said affidavit, with the endorsement thereon, is set out on pages 12 and 13 of the above petition.

The petitioner, Jonas Grossmayer, plaintiff in the said action, by his attorney therein, thereupon moved the said court to enter judgment against the defendants Dun and Douglass as by default. The motion was denied, and the order thereon is set out on page 14 of the above petition.

The said circuit court of the United States for the eastern district of Texas took judicial cognizance of the said special appearance on behalf of the defendants Dun and Douglass for the purpose of raising the question as to the validity of the service of the said summons, and as to whether in point of law it was valid and sufficient to bind the defendants or either of them and give the court jurisdiction to render judgment against them.

The said circuit court duly considered the motion so made on behalf of the said defendants, together with the proofs in support thereof, and also the return of the marshal as to the service of the said summons. Upon such consideration the court held and adjudged that the service of the summons was insufficient and invalid, and that the court was without jurisdiction to render judgment against the said defendants.

All of which is respectfully submitted.

D. E. BRYANT,
United States District Judge, Eastern District of Texas.

No 6 Orig.

6 Orig.

In Supreme Court of United States.

EX PARTE JONAS GROSSMAYER.

Brief on Motion for Leave to File Petition for Mandamus and Upon Petition for Mandamus.

KNAPP BROS., STATIONERS & PRINTERS, BALTO.

In Supreme Court of United States,

EX PARTE JONAS GROSSMAYER.

Brief on Motion for Leave to File Petition for Mandamus and Upon Petition for Mandamus.

STATEMENT.

Jonas Grossmayer, by printed petition in the hands of the Clerk of this Court, prays for the writ of mandamus requiring the Honorable David E. Bryant, Judge of the District Court of the United States for the Eastern District of Texas, to render a judgment by default in a certain cause pending in the Circuit Court of the United States for the Eastern District of Texas, wherein the said Jonas Grossmayer, a citizen of said District, is plaintiff, and Robert G. Dun, a citizen of the State of New York, and Robert D. Douglas, a citizen of the State of New Jersey, are defendants, or show cause why he does not do so.

Judge David E. Bryant was the only judge presiding in said cause in said Circuit Court, and was the sole judge presiding at the February term, 1899, of said court, when said cause was called

for a hearing, and a judgment by default was applied for in behalf of Jonas Grossmayer.

The judge presiding, the Honorable David E. Bryant, declined and refused to render a judgment by default.

The cause of action set forth in plaintiff's petition filed in said cause is, in substance: That Robert G. Dun and Robert D. Douglas were, at the time of the grievance complained of and for a long time prior thereto and at the time of filing plaintiff's petition, doing business in the State of Texas as an association, which was originally composed of the aforesaid Robert G. Dun, and Robert D. Douglas, and Erastus Wiman, and Arthur J. King, and that John Fowler, a resident of Galveston County, in the State of Texas, was the local agent and representative of said Robert G. Dun and Robert D. Douglas, doing business as an association under the name of R. G. Dun & Co. That as an association doing business in the State of Texas and in all the cities and towns in the United States, by means of local agents, the said R. G. Dun & Co. published and circulated in all the cities and towns in the United States a false and defamatory statement in writing of and concerning the said Jonas Grossmayer as a merchant, and that said Jonas Grossmayer, as a merchant, was injured by said false and defamatory publication in the sum of fifty thousand dollars.

A citation to said R. G. Dun & Co. to answer plaintiff's petition, and returnable to the February term, 1899, was issued by the Clerk of said Court and was served by the marshal of said District by a delivery to said John Fowler, as the local agent and representative of said R. G. Dun & Co. of a true copy of said citation and a certified copy of plaintiff's petition.

The said R. G. Dun & Co. did not file any answer to plaintiff's petition and did not enter any appearance in said cause.

Upon the call by the court of said cause upon the default docket

plaintiff moved the court for a judgment by default against said R. G. Dun & Co.

The court refused upon plaintiff's motion to render a judgment by default in said cause.

Article 1223 of the Revised Statutes of 1895, of Texas, is as follows:

"In any suit against a foreign private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association or acting corporation or association."

First Proposition.

When two or more non-resident persons are alleged to be an association in the carrying on of a common business, and are engaged as an association in carrying on such business in all the cities and towns in the United States, including those in the State of Texas, and are carrying on such business through and by means of local agents resident in such cities and towns, such persons so carrying on such business in the State of Texas, through local agents resident in the State of Texas, must be considered and held as constituting an association within the meaning of Article 1223 of the Revised Statutes of 1895, of the State of Texas."

ARGUMENT AND AUTHORITIES.

Mr. Sutherland, in his admirable discussion of the principles of statutory interpretation, has deduced the following rules of construction, which are respectfully submitted, as follows:

"The general intent of a statute is a key to the meaning of its "parts. The presumption is that the law-maker has a definite pur-

" pose in every enactment and has adapted and formulated the " subsidiary provisions in harmony with that purpose; that these " are needful to accomplish it; and that if they have the intended " effect, they will, at least, conduce to effectuate it. That purpose " is an implied limitation on the sense of general terms, and a " touchstone for the expansion of narrower terms. This intention " affords a key to the sense and scope of minor provisions. From " this assumption proceeds the general rule that the cardinal pur- " pose or intent of the whole act shall control, and that all the " parts be interpreted as subsidiary and harmonious." (Suther- land on Statutory Construction, sec. 240.)

Mr. Sutherland continues: "No clearer statement has been or " can be made of the law as to the dominating influence of the in- " tention of a statute in the construction of all its parts than that " which is found in Kent's Commentaries, which Mr. Sutherland " quotes as follows: In the exposition of a statute, the intention of " the law-maker will prevail over the literal sense of the terms; " and its reason and intention will prevail over the strict letter. " When the words are not explicit, the intention is to be collected " from the context; from the occasion and necessity of the law; " from the mischief felt and the remedy in view; and the intention " is to be taken or presumed according to what is consonant with " reason and good discretion. The mere literal construction ought " not to prevail, if it is opposed to the intention of the legislature " apparent from the statute, and if the words are sufficiently flexi- " ble to admit of some other construction by which that intention " can be better effected, the law requires that construction to be " adopted.

"The intention of an act involves the consideration of its sub- " ject matter or the change in or an addition to the law which it " proposes; hence the supreme importance of the rule that a stat- " ute should be construed with reference to its general purpose

" and aim. 'Where the words,' says Lush, J., in Williams vs. Ellis,
" 'L. R. 5 Q. B. Div., 'do not directly apply to the particular case,
" 'we must consider the object of the act.'" (Sutherland, p. 320-1.)

"The natural import of words is their literal sense; but this may " be greatly varied to give effect to the fundamental purpose of a " statute. The mere literal construction of a section in " a statute ought not to prevail if it is opposed to the " intention of the legislature apparent by the statute; " and if the words are insufficiently flexible to admit " of some other construction, it is to be adopted to ef- " fectuate that intention. * * * * * * The particular in- " quiry is not what is the abstract force of the words or what they " may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they " were intended to be used furnishes the rule of interpretation, " and this is to be collected from the context, and a narrower, or " more extended meaning is to be given according to the intention " thus indicated." (Sutherland, 245-6.)

Again: "The sense in which general words, or any words, are " to be used, furnishes the rule of interpretation, and this is to be " collected from the context; and a narrower or more extended " meaning will be given according as the intention is thus indi- " cated. * * * * * * Hence, though a general term fol- " low specific words, it will not be restricted by them, when the " object of the act and the intention is that the general word shall " be understood in its ordinary sense." (Sutherland, 361.)

Mr. Lieber says: "Words of a relative or of a generic meaning must be taken in a relative or expansive sense, if the character and object of the text oblige us to do so, but not if they have been used to express something definite or absolute." (Lieber's Hermeneutics, 130.)

The words "everybody, politic or corporate, and person or persons," were held to extend to parishes, though they are neither bodies corporate or politic or persons.

Rex. vs. Inhabitants of Bartow, 11 A. & E., 343.

Second Proposition.

State laws authorizing the service of citation upon the local agent of non-resident or foreign corporations and associations of persons who carry on business in the State of the domestic forum, are recognized by this court as valid and effectual to give the Circuit Courts of the United States jurisdiction to render a judgment in personam against such non-resident corporations and associations, and the service of the citation in the case at bar is valid.

AUTHORITIES.

Conn. Life Ins. Co. vs. Spratley, 172 U. S., 602.

Ex Parte Schollenberger, 96 U. S., 369.

Third Proposition.

Where a Circuit Court of the United States has jurisdiction of a cause and refuses to do what it ought to do in the due exercise of its jurisdiction, this court may issue the writ of mandamus to require the judge of such court to do what he ought to do in the premises.

AUTHORITIES.

Ex Parte Schollenberger, 96 U. S., 369.

Ex Parte Parker, 126 U. S., 737.

Ex Parte Hollan Parker, 131 U. S., 221.

Ex Parte Hohorst, 150 U. S., 653.

Respectfully submitted,

Jonas Grossmayer

No. 4 Orig.

Brief of MacFarland for Respondent

Filed Sept. 16, 1899

OFFICE SUPREME COURT, U.S.
FILED
SEP 16 1899
JAMES H. McKENNEY,
Clerk.

United States Supreme Court.

EX PARTE: IN THE MATTER

OF

JONAS GROSSMAYER, PETITIONER.

4 Orig.

BRIEF ON BEHALF OF THE RESPONDENT.

W. W. MACFARLAND,
Of Counsel for the Respondent.

Evening Post Job Printing House, New York.

United States Supreme Court.

EX PARTE: IN THE MATTER
OF
JONAS GROSSMAYER, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT.

Statement.

R. G. Dun & Company is a partnership consisting of R. G. Dun and Robert D. Douglas. The firm conducts a mercantile agency. Those agencies have become such important factors in the commercial world that Courts take judicial notice of the nature of the business.

The Eaton, &c., Co. *v.* Avery, 83 N. Y., 31.

The business requires the service of numerous local agents with different duties. In the present case service of process was made on one of those local agents in the State of Texas. The motion in the Court below for judgment necessarily admits the undisputed facts set forth in the affidavit, that the defendants are non-resident copartners; that they were not served with process, and that the local agent had no authority to accept service. The motion is founded on the proposition that, notwithstanding these facts, the plaintiff is entitled to judgment.

ARGUMENT.

First.

The petition does not state a case suitable for a writ of mandamus.

I.—This is not the case of a refusal by a court to take jurisdiction of a cause and proceed therein, as, for example, a refusal to recognize the lawful removal of a cause from a State court, and it is only in cases of which the Court erroneously declines to take judicial cognizance that the remedy by mandamus is available.

In re Hohorst, 150 U. S., 653.
Hallon Parker, Petitioner, 131 U. S., 221.
Ex parte Parker, 120 U. S., 737.
Ex parte Railway Co., 103 U. S., 794.
Ex parte Brown, 116 U. S., 401.
Ex parte Morgan, 114 U. S., 174.

The above authorities sufficiently illustrate the distinction between the cases in which mandamus and a writ of error or an appeal are the appropriate remedies.

II.—In the present case the Court did not refuse to take jurisdiction of the action, but after hearing the parties and considering their proofs the Court decided that the service of process was invalid and therefore that the plaintiff could not proceed to judgment at that stage. The decision was embodied in an order duly made and entered, and there is the same right of review by writ of error as in the case of final judgment; it is expressly so decided in Goldey *v.* Morning News, 156 U. S., 518.

III.—The particular form in which, as matter of practice, the question as to the validity of the ser-

vice of process may be raised is of no importance; various methods are equally appropriate.

Brooks *v.* Dun, 51 Fed. Rep., 139, 147, 148.

IV.—The action has not been dismissed, but it cannot be made effective and be proceeded in, until there shall have been due service of process. In retaining the action but declining to give judgment until due proof of such service the Court followed the rule laid down in Harkness *v.* Hyde, 98 U. S., 476, and in Brooks *v.* Dun (above), p. 148.

But it is enough to say, that if the decision of the Court was erroneous, the remedy is by writ of error, not mandamus, for when a party may have the former remedy he certainly cannot at his election have the latter. It is unnecessary to add that the defendants were at liberty to appear, and did appear, for the special purpose of raising the question as to the validity of the service of the summons, and for no other purpose.

Second.

The service of the summons was void; there was therefore no jurisdiction to render the judgment demanded against the defendants.

I.—In the first place neither of the defendants were residents of the Eastern District of Texas, nor were they found therein. The return of the Marshal states (Petition, p. 25) that the summons was served upon "John Fowler, the local agent of R. G. Dun & Co.," but in this naked statement there is nothing to suggest the legal equivalent of a personal service, and the affidavit of Fowler (p. 12) shows the absence of any authority to accept service.

II.—Brooks *v.* Dun (51 Fed. Rep., p. 138), decided 1892, and cited above, is almost identical with the present case, and the defendants were the same. It was also an action for damages, and there was service of process upon a local agent. It was brought in a State court of Tennessee and removed into the Federal court, for which purpose only the defendants appeared specially. There was then in the Federal court a "motion to dismiss for want of proper service" (p. 139). The plaintiff in the action relied on the following provision of a statute of the State:

"When a corporation, company or individual has an officer or agency or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein, in all actions brought in such county against said company, growing out of the business of or connected with said company or principal's business" (Thomp. & S. Code, Sec. 2834*a*; Mill & V. Code, Secs. 3516, 3539).

Judge Hammond in a very elaborate opinion states the history of the provision. He doubts whether the words "companies" or "individuals" include non-residents or foreigners, and says, "service of process upon companies or individuals can be made without legislation upon the person, but service upon 'corporations' must be by legislation, * * * and we must not confuse these separate purposes of the Code: One to authorize and regulate the service of process on corporations, and the other, and the very most that can be claimed for it, providing a very limited substituted process for companies and individuals; that is to say, a service not personal in the sense of the common or general law governing the service of process on individuals, but something else than this in place of it, as where some statutes authorize service on a wife or other person residing at the domicile of the defendant, or

by mailing the process to the door, or the like. It is my opinion that the substituted service so provided by this act for 'companies' and 'individuals' *was not intended for any non-resident or foreign 'company' or 'individual' not a 'corporation,'* whatever may be said of it. But if this provision of the Tennessee Code ought to be construed as to authorize a service of process for non-resident partners, in a case like this, upon their resident agent, without any attachment of or proceeding against their property, or if such construction had been given to it by the Supreme Court of the State, *this Court would not necessarily be bound to follow it, or to so adjudge, as its constitutionality would still be open to consideration here.* Since the leading case of Pennoyer *v.* Neff, 91 U. S., 714 (decided by the Supreme Court of the United States in 1877), it seems to be well settled that a personal judgment against a non-resident in a suit where no service was had on him in the State, and he has not appeared in the suit, *is without any validity.*"

Judge Hammond then proceeds to examine at great lenth all the previous decisions on the point. Summing up he says: "Since the case of Pennoyer *v.* Neff (*supra*), the question there decided has been often before the Circuit Courts, and in various forms, and their decisions have been uniformily adverse to the validity of service in such cases as this without personal service of the defendant within the State where the suit is brought, or his voluntary appearance therein," citing numerous cases.

III.—Since the decision in the above case of Brooks *v.* Dun, the whole subject has again been exhaustively examined by this Court in Goldey *v. Morning News* (156 U. S., 518). It is there said:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within

its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government (D'Arcy *v.* Ketcham, 11 How., 165; Knowles *v.* Gaslight Co., 19 Wal., 58; Hall *v.* Lanning, 91 U. S., 160; Pennoyer *v.* Neff, 95 U. S., 614; York *v.* Texas, 137 U. S., 15; Wilson *v.* Seligman, 144 U. S., 41.)."

"For example, under the provisions of the Constitution of the United States and the acts of Congress, by which judgments of the courts of one State are to be given full faith and credit in the courts of another State, or of the United States, such a judgement is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice (Constitution, Art. 4, Sec. 1; Acts of May 26, 1790, C. 11, Stat. 122, and March 27th, 1804, c. 56, Stat., 299; Rev. Stat., Sec. 904, Knowles *v.* Gaslight Co. and Pennoyer *v.* Neff, above cited." See also Harkness *v.* Hyde (98 U. S., 476); Mexican Ry. Co. *v.* Pinckney (149 U. S., 194); Dun *v.* Brooks (*supra*).

IV.—The rule of decision in such cases is to be found not in State statutes but in the laws of the United States. Thus in Goldey *v. Morning News*, it is said: "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The Legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit

the effect of such removal." To the same point, Toland *v.* Sprague (12 Peters, p. 328); Main *v.* Second National Bank (6 Bissel, 26).

V.—The distinction between this rule of *substantive* law, and a mere regulation or *practice* in regard to the service of process upon persons within the jurisdiction is seen in Amy *v.* Watertown (130 U. S., 302).

VI.—In fact there is no State statute even in verbal expression relevant to the case. The petitioner relies upon the following article of the Revised Statutes of Texas—Article 1223:

"In any suit against a foreign, private or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association or acting corporation or association."

But plainly this article has no relation to partnerships, they are not mentioned. The succeeding article, 1224, expressly provides for the service of process "in suits against partners." It is in the folllowing words:

"In suits against partners the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

If legislation should define a partnership as a corporation joint stock company or association such folly would not be attended by legal consequences. A partnership would still remain what, by the rules of law it is, with all the incidents attaching to that relation.

But no such legislative eccentricity is perceived. The word "association," on which the petitioner founds his argument, is indefinite,

and may be intended to embrace some collective body between a corporation and a partnership, or it may be a common case of tautology and synonomous with "joint stock company." But it is entirely certain that it does not define a copartnership, for that relation connotes a very definite and precise set of legal ideas and rules that no one would dream of indicating by any other name than partnership, for no other would be at all applicable. Moreover, as we have seen, the statute in expres sterms makes the distinction between partnership and the association intended.

Third.

The authorities cited in support of the petition are not relevant.

I.—These authorities all belong to an entirely different domain of law, so far as process and service thereof is concerned. They relate to corporations as pointed out by Judge Hammond in Brooks *v.* Dun (*supra*). The error in the reasoning is in the first *assuming* that the defendants constitute a corporation, or its equivalent, and then applying the authorities to that false hypothesis.

II.—In support of the validity of the service the following cases are cited:

1. Conn. Mut. Life Ins. Co. *v.* Spratley (172 U. S., 602). This case involved the question whether a corporation was still doing business in a State, and it was one of mixed law and fact.

2. In *ex parte* Schollenberger it was decided that a foreign corporation might be required to comply with the provisions of a statute in relation to the

service of legal process as a condition of being permitted to carry on its business in the State, and the doctrine in that case is affirmed in the one last above mentioned.

III.—The cases cited in support of petitioner's right to have a writ of mandamus have been noticed under the first point of the brief, where it is pointed out that they are irrelevant.

Fourth.

It is submitted that the prayer of the petition should be denied. But if the foregoing argument against the petition should not be approved, then it is submitted that the order, to be entered upon the petition, should give the defendants leave to answer in the court below, where the action is still pending.

W. W. MacFarland,
Of Counsel for the Respondent.

NOTE: It was essential to the jurisdiction of the Circuit Court that the plaintiff should be a resident of the District, as neither of the defendants were residents thereof. It was further essential that the fact of such residence should appear in the petition or complaint by which the plaintiff's suit was commenced. (Mex. Cen. Ry. Co. vs. Pinkney, 149 U. S. 194). The plaintiff in his original petition or complaint alleges that he is a citizen of Galveston County in the Eastern District of Texas. It is submitted whether that is a sufficient allegation of residence.

IN RE GROSSMAYER, PETITIONER.

ORIGINAL.

No. 4. Submitted Febuary 26, 1900. — Decided March 26, 1900.

If the Circuit Court of the United States, after sufficient service on a defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute.

Under articles 1223 and 1224 of the Revised Statutes of Texas of 1895, an action cannot be maintained against a partnership, consisting of citizens of other States, by service upon an agent within the State.

THE statement of the case will be found in the opinion of the court.

Mr. Thomas Harvey Clark for Grossmayer.

Mr. William W. MacFarland opposing.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a petition for a writ of mandamus to the District Judge of the United States for the Eastern District of Texas, holding the Circuit Court of the United States for that district, to enter judgment by default for the petitioner in an action brought by him in that court.

The proceedings in that action, as appearing by the petition for mandamus, and by the judge's return to a rule heretofore issued by this court, were as follows: The petitioner, a citizen of the State of Texas, and a resident of Galveston in the Eastern District of Texas, brought an action in that court to recover damages in the sum of $50,000, against Robert G. Dun, a citizen of the State of New York, and Robert D. Douglas, a citizen of the State of New Jersey, alleging that the defendants carried on business in that district, and throughout the United States, as an association under the name of R. G. Dun and Company,

and praying for a summons to said R. G. Dun and Company, to be served upon John Fowler, alleged to be a resident of Galveston and the local agent of said R. G. Dun and Company. A summons was issued accordingly, and the marshal returned that he had served it upon Fowler as such local agent. The defendants having filed no plea, answer or demurrer in the action, the plaintiff moved for a judgment by default. The defendants then, appearing specially for the purpose, filed a plea to the jurisdiction of the court, because the defendants were not and never had been a corporation, but were private individuals, citizens of the States of New York and New Jersey respectively and not of the State of Texas; and in support of this plea filed an affidavit of Fowler to the truth of the facts therein stated. And the court thereupon entered the following order: "On this day came the plaintiff, by his attorney, and moved the court that judgment by default be entered against the defendant herein for the want of an appearance or answer, as required by law; and the said motion having been heard and argued before the court, and the court being sufficiently advised, it is considered and ordered by the court that the said motion be denied."

Two objections are made to the issue of a writ of mandamus: 1st. That, if the decision of the Circuit Court was erroneous, the remedy was by writ of error, and not by mandamus. 2d. That the Circuit Court had no jurisdiction of the action, for want of due service upon the defendants.

The objection to the form of remedy cannot be sustained. A writ of mandamus, indeed, cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. A final judgment of the Circuit Court of the United States for the defendant upon a plea to the jurisdiction cannot therefore be reviewed by writ of mandamus. But if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute. *Ex parte Schollenberger*, 96 U. S. 369; *Pennsylvania Co., petitioner*, 137 U. S. 451–453; *American Construction Co.* v. *Jacksonville &c.*,

Railway, 148 U. S. 372, 379; *Hohorst, petitioner*, 150 U. S. 653, 664. In *Goldey* v. *Morning News*, 156 U. S. 518, cited for the respondent, which was brought to this court by writ of error, the Circuit Court had entered a final judgment in favor of the defendant, setting aside the summons, and relieving the defendant from appearing to answer the complaint. But in the case now before us that court has done no more than to decline to enter a judgment in favor of the plaintiff. The plaintiff could not sue out a writ of error before a final judgment had been entered against him; and he could not compel the Circuit Court to proceed to final judgment, otherwise than by a writ of mandamus.

But the Circuit Court rightly held that it had no jurisdiction to enter judgment against the defendants, because there had been no lawful service of the summons upon them. It appears by the record, and is not now denied by the petitioner, that the defendants were a partnership. In the absence of local statute, no valid judgment can be rendered against the members of a partnership without service upon them. *D'Arcy* v. *Ketchum*, 11 How. 165. The Revised Statutes of Texas of 1895 contain the following provisions:

"ART. 1223. In any suit against a foreign private or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association or acting corporation or association.

"ART. 1224. In suits against partners, the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

It is argued, in behalf of the petitioner, that the defendants in this case were an "association," within the meaning of article 1223 of these statutes, and therefore service on their local agent within the State was sufficient. But upon reading that article in connection with article 1224, which immediately follows it, it is manifest that the words in the former section, "cor-

poration, joint stock company or association, or acting corporation or association," were not intended to include partnerships; and that the mode of service in actions against partnerships was regulated by the latter section, which requires service in such actions to be made upon one of the firm. As no such service had been made in the case before us, the Circuit Court had no jurisdiction to entertain the action, or to render judgment against the defendants.

Writ of mandamus denied.